

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

FLINT HILLS RESOURCES LP and
KURTZ PARAMEDIC SERVICES, INC.¹

Employers

and

UNITED STEELWORKERS INTERNATIONAL
UNION, LOCAL 662

Petitioner

Case 18-RC-17418

DECISION AND DIRECTION OF ELECTION

As amended at the hearing, Petitioner seeks to represent a unit of firefighters directly employed by Kurtz Paramedic Services, Inc. (hereafter “Kurtz”) who work at an oil refinery owned and operated by Flint Hills Resources LP (hereafter “Flint Hills”). Petitioner contends that Kurtz and Flint Hills (hereafter referred to collectively as “the Employers”) are a joint employer of the proposed unit employees. The Employers contend that they are not joint employers and the firefighters are employed solely by Kurtz. In addition, the Employers maintain that the firefighters are guards as defined by the Act. The parties also dispute whether Captains and the Contract Coordinator employed by Kurtz are supervisors within the meaning of the Act.

Based on the record and the relevant Board cases, I find that the firefighters are employees of Kurtz and that Flint Hills is not their joint employer; that the firefighters are

¹ Each Employer’s name appears as amended at the hearing.

not guards; that the Contract Coordinator is a supervisor and thus should be excluded from the unit; and that the Captains are not supervisors and thus should be included in the unit.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employers are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²
3. The labor organization involved claims to represent certain employees of the Employers.
4. A question affecting commerce exists concerning the representation of certain employees of Kurtz within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The first part of this decision will describe the Employers' facilities. Next, I will summarize the business relationships between them. Third, I will review the job duties of the Kurtz employees at issue and of the Flint Hills employees with whom they

² Flint Hills Resources LP is a limited partnership registered in Delaware, with an office and place of business in Rosemount, Minnesota, where it operates a petroleum refinery. During the past 12 months, a representative period, Flint Hills Resources, LP sold goods valued in excess of \$50,000 directly to customers located outside the State of Minnesota and earned gross revenues in excess of \$1,000,000.

Kurtz Paramedic Services, Inc. is an Illinois corporation with a place of business located at the Flint Hills Resources petroleum refinery in Rosemount, Minnesota, where it provides fire fighting and emergency medical services. During the past 12 months, a representative period, Kurtz Paramedic Services, Inc. has sold goods or services valued in excess of \$50,000 directly to customers located outside the State of Minnesota and earned gross revenues in excess of \$1,000,000.

interact. Fourth, I will describe the jobs and duties of Contract Coordinator Steve Bloomstrand and the Captains. The final part of this decision will apply the Act and Board precedent to those facts on the contested issues regarding joint employer status, guards, and supervisors.

Flint Hills' and Kurtz's Facilities

Flint Hills operates a large oil refinery, located in Rosemount, Minnesota, which is a suburb of the Minneapolis/St. Paul metropolitan area. It directly employs about 730 employees. It also routinely utilizes independent contractors to work at the refinery, including construction and building trades companies, especially during maintenance “turnarounds.” During a turnaround, which might last for a month, Flint Hills shuts down all or part of the refinery to accomplish major replacements, repairs, and routine maintenance. Up to 900-1000 contractor employees may be engaged at the site at any given point in time.

The refinery is served by local municipal fire departments and ambulance services. Flint Hills also employs its own “volunteer” fire department. This includes about 50 of its own employees primarily engaged in other jobs—mechanics, operators, some salaried employees—who are trained for rapid response to fires and other emergencies. In addition, and after September 11, 2001, among other measures designed to “beef up” security, Flint Hills decided to maintain a full-time, dedicated fire department, and it contracted with Kurtz to provide that service. At the same time, Flint Hills contracted out security-guard patrols to American Security Co.

Because of the nature of this operation, safety and safety regulations are of paramount importance. For example, OSHA is particularly aggressive in its oversight, including requiring frequent computer-based training. In addition, municipal fire departments in surrounding communities participate in some training provided by Flint Hills on site that both Flint Hills volunteer firefighters and Kurtz firefighters attend. Finally, Kurtz employees and Flint Hills firefighters attend a 24-hour course every three years in Corpus Christi, Texas, specifically related to fighting fires in oil refineries.

Flint Hills has a safety department, supervised by Safety Manager Joe Allaben. It includes a small medical staff, some industrial hygienists, and emergency responders. The emergency responders directly employed by Flint Hills include Fire Chief Mark Blochinger, Training Chief Pete Herpst, Contractor Safety Coordinator Chris Rapp, four Battalion Chiefs, and four Safety Specialists. One Battalion Chief and one Safety Specialist work each of four different 12-hour shifts, which provide 24/7 coverage. Flint Hills' volunteer firefighters report for duty under the safety department managers only when there is a fire or other emergency requiring additional personnel.

The central part of the refinery is designated a "blast zone." Access to it is restricted to persons with electronically-scannable access badges. All Flint Hills employees and contractor employees are required to undertake training in safety procedures appropriate to this flammable and explosive area, including lockout-tagout rules, evacuation plans, and fire safety. Flint Hills personnel monitor all badge-holders for completion and periodic refreshers on this safety training, and can deny access to the property by "turning off" the access badge of any person who fails to meet training requirements.

Flint Hills controls access to its property by a series of fences, more solid barriers, and gates. The gates are monitored by employees of American Security Co. These guards also patrol the facility. They are unarmed and are expected to call local municipal law enforcement personnel regarding any incident that would require a forcible response. There is no evidence that firefighters employed by Kurtz monitor gates, or regularly patrol the refinery for any purpose other than fire detection and prevention. Flint Hills put into the record evidence that a Kurtz firefighter directed traffic after a vehicle accident involving Flint Hills employees. There is no evidence, however, that this has happened more than once, or that this was within the firefighter's normal job description rather than an attempt by a passerby to be helpful.

The fire station is in a building known as the north fire barn. It is on Flint Hills' property but outside the controlled-access blast zone. It includes sleeping quarters, kitchen facilities, exercise equipment, and office facilities. Since Flint Hills contracted with Kurtz to provide firefighting services, only Kurtz employees engage in routine work in the fire barn. The fire barn also accommodates occasional visitors and functions, such as a recent company-anniversary party, to which other employees and even members of the public have access. Kurtz's employees have to open a gate with their access badges to get back into the main refinery blast zone.

The fire barn office is a converted bedroom used primarily by Contract Coordinator Steve Bloomstrand. It includes a file cabinet in which employee personnel files are kept. These files include annual performance evaluations; commendations from Kurtz, Flint Hills, and other contractors; and copies of the employees' licenses and certifications. There is a computer in a common area of the fire station to which all

employees have access. They all routinely use it to check schedules and to complete some of their periodic training requirements (known as “VTA” (visual training aids) or “CBT” (computer-based training)).

Kurtz’s main office is in New Lenox, Illinois. Bloomstrand reports to Vice President and General Manager Tom Vana and Director of Operations Heidi Hermes, both located in New Lenox. Vana and Hermes visit the Rosemount facility four or five times a year, for a day or two at a time. Vana and Hermes administer similar services at 17 locations across the country, including firefighting units at two other oil refineries. Each employee has another file in New Lenox, including their job applications, insurance forms, etc., without duplicating what is kept at the fire barn in Rosemount.

Business Relationship

Flint Hills and Kurtz share no common ownership, direction or management. They maintain separate personnel policies, separate employee benefit programs, and separate insurance. New employees undergo separate orientation. The contract between Kurtz and Flint Hills requires Flint Hills to pay a lump sum, which Kurtz is free to apportion among wages, benefits, and any other expenses. “Normal” overtime, such as employees covering shifts for an ill co-worker, must be covered by the lump sum. Flint Hills pays itemized overruns only for “abnormal” overtime, such as that required by an emergency on the site, and special training costs, such as refinery-fire training in Texas. There is no evidence that Flint Hills has control or even input into Kurtz employees’ wages or benefits.

When Kurtz was initially hiring in late 2001 and early 2002, Flint Hills managers routinely sat in on interviews to answer questions about the refinery. They still attend

an occasional interview. There is no evidence, however, that any Flint Hills personnel has ever tried to influence the choice of applicants.

Job Duties and Interactions

Kurtz's firefighters started on 24-hour shifts, then changed to 12-hour shifts at Flint Hills' request to match Flint Hills employees' schedule. When Kurtz employees complained about the change, Flint Hills agreed to let Kurtz work 24-hour shifts, with limitations and exceptions, and that has been the Kurtz firefighters' normal schedule since then. It has a relatively permanent assignment of three crews, A, B, and C, each consisting of one Captain and four firefighters. Bloomstrand works with the C crew, and is available by phone when he is not on duty. There is always a Flint Hills Battalion Chief and Safety Technician on duty also, and they work closely with the Kurtz crews, as described below.

All of the Employers' employees who work within the blast zone routinely wear fire-resistant jumpsuits. The firefighters add a heavier-duty fire suit with helmet and self-contained breathing apparatus when appropriate to an emergency response. Kurtz's firefighters wear blue fire helmets; Captains and the Contract Coordinator wear yellow helmets with the word "Captain" on them.

A typical day for Kurtz's firefighters includes the following. Kurtz's employees start at 6 a.m. Bloomstrand performs his "administrative functions"—filling out payroll forms, checking on vacation requests and otherwise maintaining the schedule—within an hour or two. Bloomstrand serves as a firefighter, not as Captain, for the rest of the day. The Captain finds the "task calendar," prepared by Flint Hills personnel, on the computer to find the day's tasks. In addition, the Captain attends a meeting at 6:30 a.m.

in the control room, conducted by Flint Hills personnel. Among other things, they might point out high-risk activities scheduled somewhere in the refinery that might affect fire danger. At 7 a.m., the Captain meets with the Kurtz firefighters to deliver the task calendar and any relevant messages from the 6:30 meeting in the control room.

The task calendar, also called the mechanical integrity or MI check, basically means maintenance of the fire response system at the refinery. This includes hose testing, alarm testing, checking and recharging fire extinguishers, winterizing fire hydrants, fire pump checks, fire alarm checks, and checks of post indicator valves, the fire water system and the fire water block.

The tasks established by Flint Hills can be very time consuming. The task calendar includes work sufficient to fill an 8- to 10-hour day. Hose testing alone involves checking out eight miles of hose. The Employers emphasize that the aforementioned duties used to be performed by its security department, apparently to support their argument that the Kurtz firefighters are guards.

All of the fire trucks, water rescue boats, and any other equipment used or subject to inspection and maintenance by the Kurtz employees belong to Flint Hills. Flint Hills also conducts a drill every Wednesday that may include its volunteer firefighters, and possibly a live fire, as well as other unscheduled drills. At the end of the day, Kurtz has to turn in to Flint Hills a form checking off all duties performed that day. The rest of the firefighters' shift includes computer-based training, meal time, lifting weights, and designated "down time" of about eight hours, although even then they remain on call for emergencies.

The Captain is responsible for dividing up the work on the checklist, but in practice the crews themselves reach a collegial division. One employee testified that each employee has pretty well settled into one of four “work units” (geographic sections of the facility) and that pretty much determines what tasks each firefighter takes off the list.

The task calendar (or MI check) is created by Flint Hills Fire Chief Mark Blochinger and the Battalion Chiefs. Kurtz firefighters go to Blochinger to ask if any other duties need to be performed, besides those on the task calendar. According to Blochinger, sometimes he assigns additional tasks and sometimes he does not. Blochinger testified that he talks with the Kurtz firefighters on a regular basis. Blochinger testified that the Kurtz firefighters also check with Flint Hills Training Chief Pete Herpst with regard to any training opportunities in addition to the computer-based training. It appears Kurtz firefighters have some discretion to decide in what order to tackle the tasks on the task list, but they cannot put things off for the next day without authorization from the Fire Chief or the Battalion Chief on duty. Even some of the procedures for how Kurtz firefighters are to perform some of the tasks on the list have been written out by the Battalion Chiefs.

In an emergency, Flint Hills’ Battalion Chief on duty acts as incident commander, with authority to direct anyone involved, be they security guards, Flint Hills employees, or Kurtz employees. Besides emergencies, no Flint Hills employees report directly to the Battalion Chiefs or the shift Safety Specialists.

Kurtz provides occasional relief services in case a Flint Hills Battalion Chief or Safety Specialist is absent and can't be replaced. There is no evidence of how often

this happens. At night, Flint Hills normally employs one Battalion Chief and one Safety Specialist. However, should one or the other be absent, a Kurtz firefighter acts for the absent person. This relief duty requires the Kurtz firefighter to stay awake and alert with the other Battalion Chief or Safety Specialist instead of being able to sleep at the fire station. Sometimes they perform duties for Flint Hills while acting as Safety Specialist or Battalion Chief, but this occurs only when the Battalion Chief or Safety Specialist asks them to do so, and does not appear to be routine.

During a maintenance turnaround, Kurtz firefighters “audit” certain employees and contractors and fill out a form created by Flint Hills. Some of it is open inspection, and some of it is surreptitious surveillance. It includes quizzing employees on their knowledge of things like escape routes and whether they have any required permits or licenses. Flint Hills’ Battalion Chiefs and Safety Specialists engage in similar audits.

The Contract Coordinator and Crew Captains

Job applications for Kurtz’s positions are collected and screened at the fire station. When Vana and Hermes authorize an opening, Bloomstrand decides whom to interview out of his collection of applications. The finalists meet with the entire crew that has the opening, and the crew reaches a “consensus” decision on whether the applicant is worthy. So far, the crews have not countermanded any of Bloomstrand’s finalists. Kurtz has hired five firefighters in the past year. Hermes testified that Bloomstrand asked her some questions about one of them, but selected the other four autonomously.

Although not entirely clear from the record, it appears that Bloomstrand independently decided to use the approach that the entire crew interview chosen applicants. That is, this method of interviewing and hiring is not required by anyone

higher up at Kurtz. Thus, having decided to involve the crew does not diminish Bloomstrand's ultimate authority. In addition, it is apparent from documents in the record from around the time Bloomstrand was promoted to Contract Coordinator that Bloomstrand emphasized his participation in hiring decisions when working for the prior Contract Coordinator, recognizing the importance of this skill to the Contract Coordinator's job.

A normal crew includes five firefighters, although Flint Hills will apparently accept four. Employees submit vacation requests in advance to Bloomstrand. Although one Captain testified that "seniority rules," no basis for that opinion was offered and there was no other evidence on what if anything Bloomstrand would do in case of conflicting requests. Bloomstrand is responsible for scheduling employees' hours of work.

In cases of illness or other absenteeism less predictable than vacations, Bloomstrand or even the other firefighters will call around among those off duty looking for a volunteer. If someone suddenly leaves a shift early, Hermes testified it would be up to the Captain whether to seek a replacement or not. The schedule is such that most if not all substitutions, whether on short notice or for vacations, will be paid at overtime rates. Leading questions prompted several witnesses to agree that Bloomstrand or the Captains have authority to force an off-duty employee to report for a substitute shift, but there is no evidence that has ever happened.

Bloomstrand does an annual performance review for the Captains. The Captains do an annual review on each firefighter, and the Captain on Bloomstrand's crew evaluates Bloomstrand. The evaluator gives an oral explanation and "pep talk" to the evaluatee. The form includes a number of narrative sections and a summary scoring

section with the following choices: 1) Exceeding Expectations; 2) Meeting Expectations; 3) Not Meeting Expectations. There is no explicit reference in the evaluation form to any impact on wages. Bloomstrand also solicits a “peer review” from each firefighter on each other and the Captains, but discards them after he uses them in writing his evaluations. There are four evaluations in the record, all of which earned the high score of “1,” all including more or less glowing narrative praise.

Vana and Hermes decide on an annual wage increase. After determining their budget, they review evaluations prepared by the Captains and Bloomstrand and give each employee a numbered rating, 5 for the best and 1 for the least. Then they divide up the amount budgeted for increases, awarding bigger raises to the higher scorers. Vana testified that he did not solicit any recommendations or any other information from Bloomstrand or anyone else when he did his ratings—he relied solely on the written evaluations done by the Captains and Bloomstrand. The four employees evaluated in this record earned scores of 5, 5, 3, and 2 from Vana, and raises ranging from \$2750 to \$2000. There is no explanation for how Vana could distinguish the 5’s from the 2 based solely on the Captains’ evaluations.

However, Vana’s testimony, which was offered at the end of the hearing, differs significantly from the testimony of Hermes. Hermes testified that she and Vana traveled to the Flint Hills facility; they had the written evaluations and a conversation with each employee; “we did our evaluations ourselves and made a decision on their wages at that time”; “we ranked them on a scale of 1 to 5”; and they sought no input on the wage decisions from Bloomstrand or the Captains.

The Captains received a \$500-a-year wage increase when made Captains. Bloomstrand got a raise of \$5000 a year when made Contract Coordinator. Under Kurtz's policy of granting annual increases based on assessed merit, the gap between Captains and the Contract Coordinator on the one hand, and the firefighters on the other, can and has grown or shrunk year to year.

Bloomstrand became Contract Coordinator in September 2004, when his predecessor took a job with Flint Hills as a Safety Specialist. The solicitation for applications to fill that job lists "Disciplinary issues" as a "key requirement" of the position. Hermes testified that Bloomstrand and the Captains have independent authority to discipline, but the examples to support that conclusionary assertion are few.

Kurtz offered one warning into evidence, signed by Bloomstrand as "Senior Captain," a title used nowhere else, and by Captain Richardson. It is for an unexcused absence of an employee who decided to "sleep in" after several midnight calls at his other job, apparently in an ambulance or paramedic position, and says two more similar incidents within six months will earn a suspension. Petitioner then submitted an e-mail from Hermes to Bloomstrand stating that she took a call from Flint Hills Fire Chief Blochinger, reporting this employee's phone call that he would be absent to the Battalion Chief on duty. Hermes directed Bloomstrand to write the employee up, with a detailed explanation why such discipline was appropriate.

Only one discharge decision was substantially described. In the summer of 2005, a firefighter hit the garage door of the fire station with a fire truck, causing \$4500 worth of damage to the building, which Kurtz paid for, and unquantified damage to the truck. Blochinger called Bloomstrand at his other job as a volunteer firefighter for the

City of Hastings, Minnesota, described the incident, and requested that Bloomstrand come in right away. Bloomstrand told Hermes and Vana about the incident, and they told Bloomstrand to send the employee home.

The evidence regarding Bloomstrand's involvement in the decision to discharge the employee involved in this accident is inconsistent. Hermes testified that she decided to fire this employee because of his checkered history despite Bloomstrand's recommendation that he be given another chance. She testified that she decided to fire the employee based on Bloomstrand's investigation of the accident and her own review of the employee's record. She testified that while Bloomstrand wanted to suspend the employee, she responded, "No. We've had enough," and fired him. However, Kurtz also introduced a memo from Bloomstrand to Hermes on this incident in which he listed the employee's prior infractions (four incidents of sleeping on the job, four property damage incidents, and three problems characterized as "dishonesty" in two years), and recommended that "It is in the best interest of the Kurtz group to terminate [him]."

A couple years ago, Kurtz reduced force by two firefighters. Hermes directed the Contract Coordinator and the Captains to rank everyone from top to bottom, with the intention of laying off the two low scorers, although she did not say whether she told the coordinator and Captains that was the purpose of the ranking. One firefighter coincidentally resigned, so only the low scorer was laid off.

When Bloomstrand is not on duty, there is no replacement selected to perform his Contract Coordinator duties. According to Flint Hills Fire Chief Blochinger, he expects Bloomstrand to be accessible any time Blochinger needs him. Therefore, Bloomstrand has a cell phone and a pager. Battalion Chiefs also have Bloomstrand's

cell phone and pager numbers. Bloomstrand works 24 hours, and then is off for 48 hours. Since August 2005, Bloomstrand has been attending paramedic school and has not been working any shifts Monday through Friday. The cost of attending paramedic school is being paid by Kurtz.

It is clear that Bloomstrand considers himself, and Hermes considers him, to be the liaison between Hermes and the employees. Hermes testified that Bloomstrand is to remain in communication with her regarding any issues he has, although in her view Bloomstrand can issue written and verbal warnings. While not described in any detail in the record, according to Hermes, Bloomstrand is also responsible for training new employees.

Conclusions

Flint Hills and Kurtz Are Not Joint Employers

“Two or more entities are joint employers of a single work force if they ‘share or co-determine those matters governing the essential terms and conditions of employment.’” Aldworth Co., 338 NLRB 137, 139 (2002) (quoting NLRB v. Browning-Ferris Ind., 691 F.2d 1117 (3d Cir. 1982)). Both employers must meaningfully affect significant aspects of the employment relationship, such as hiring, firing, discipline, and daily direction and supervision. Villa Maria Nursing Home, 335 NLRB 1345, 1348-1349 (2001).

There is virtually no evidence that Flint Hills has any effect on hiring, firing, or discipline decisions. For example, although Flint Hills managers have observed job interviews and asked questions, there is no evidence Flint Hills has any meaningful input into hiring decisions. I also find no evidence that Flint Hills has any authority to

discipline or discharge Kurtz's employees. Most of the issues cited in the record have Blochinger or a Battalion Chief forwarding information, such as an employee's absence on short notice, or an employee's training deficiency, to Bloomstrand or Hermes. Flint Hills does not take action on the employee directly—it relies on Kurtz's supervisors to take care of the problems, holding only the ultimate sanction of access badge revocation in reserve if Kurtz can't maintain minimum standards.

Bloomstrand agreed with the leading question of whether Blochinger had ever told him to suspend anyone, and then described the Schroeder discharge. From the rest of that story, however, it appears that Vana and Hermes decided to suspend and then discharge Schroeder, and there is no evidence they were influenced by or even talked to Blochinger. In addition, Blochinger testified that he did not tell Bloomstrand what if anything he should do about the situation.

The only substantial issue regarding potential control by Flint Hills is on the subject of work directions. Regarding the daily routine, most of these directions, including the maintenance schedule, the type of uniform required, and continuing training requirements, relate to care and upkeep of Flint Hills' property and/or compliance with government-mandated health and safety regulations. The Board does not consider such directions significant indicia of meaningful control. See Aldworth Co., 338 NLRB at 139-140 (enforcement of legally mandated DOT regulations on subcontractor "not reliable indicator[]" of joint employer status); Hychem Constructors, Inc., 169 NLRB 274, 276 (1968) (requirement that subcontractor observe plant safety rules "is a natural concomitant of the right of any property owner or occupant to protect his premises" and not a substantial indicia of joint employer status).

Thus, to the extent that Flint Hills requires computer-based training for Kurtz firefighters and develops the daily task list, it does not appear that these functions indicate joint-employer status. There is little or no evidence to refute the Employers' contentions that these functions are developed to comply with OSHA regulations and other safety standards, and are therefore not the result of the desires of Flint Hills itself.

Directions by Flint Hills' Battalion Chief or other incident commander during an emergency or drill are almost by definition not routine. I consider that, however, part of the "natural concomitant" of the property owner's control over its property and, in light of Kurtz's autonomy in all other terms and conditions of employment, insufficient to require finding Flint Hills a joint employer.

In addition, there is evidence that Kurtz firefighters seek assistance from the Flint Hills Fire Chief, Battalion Chiefs, and Safety Specialists regarding changes to the task list. Moreover, the Flint Hills Fire Chief, Battalion Chiefs, and Safety Specialists are in daily contact with Kurtz firefighters (whether in person or by cell phone or pager). However, I conclude that this control exercised by Flint Hills personnel over Kurtz firefighters is far short of the type of control necessary to establish a joint employer, since there is no evidence that Flint Hills is involved in the discipline, evaluation of work, hiring, firing, layoff, scheduling or determination of wages and benefits of Kurtz firefighters. Executive Cleaning Services, 315 NLRB 227, 235-236 (1994); cf. W.W. Grainger, Inc., 286 NLRB 94 (1987).

Kurtz's Firefighters Are Not "Guards"

Section 9(b)(3) of the Act defines a guard as "any individual employed as a guard to enforce against employees and other persons rules to protect property of the

employer or to protect the safety of persons on the employer's premises." The significance of the issue for this case is that the same section of the Act prohibits certification of any labor organization as representative of a unit including guards if that labor organization admits non-guards to membership. It is stipulated in this case that Petitioner admits non-guards to membership.

The Board distinguishes between employees charged with protection of the employer's property from fire and other safety hazards and employees "charged with traditional police and plant security functions." Boeing Co., 328 NLRB 128, 130-131 & n.11 (1999) (quoting Burns Security Servs., 300 NLRB 298, 300 (1990), enf. denied, 942 F.2d 549 (8th Cir. 1991)). Traditional police and security functions appear to require responsibilities for enforcement in areas other than those related solely to fire and other safety issues, such as rules against theft, vandalism, and stranger intrusion. The Board will consider

enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer's premises; and wearing guard-type uniforms or displaying other indicia of guard status.

Boeing Co., 328 NLRB at 130.

In this case, Kurtz employees' responsibilities are limited to fire safety, prevention and suppression. I reach this conclusion based on clear record evidence provided by Flint Hills' witnesses that Flint Hills hired two separate contractors after September 11, 2001. It hired a security company just for refinery safety and security of the plant. It also hired a full-time fire-fighting group, rather than rely on its own volunteers and municipal fire departments. To quote the testimony of Flint Hills Safety Manager Joe

Allaben, “[M]y expectations of Kurtz is they hire people that know how to fight fires and that’s the service they provide to us.” Thus, Flint Hills’ own witnesses make clear that there is a clear delineation in responsibilities between its security contractor and its fire-fighting contractor.

I also reach the conclusion that Kurtz employees’ responsibilities are limited to fire safety, prevention and suppression based on the location of their work site and their close connection to Flint Hills volunteer firefighters. While the Kurtz employees perform duties throughout the refinery, their work site for training, sleeping, exercise, and reporting is the north barn, located outside the blast zone. There is no evidence that any security personnel also report to or have any job-related functions at the north barn. Moreover, Flint Hills has 50 of its own employees who are designated as firefighters. While these 50 employees hold other jobs and are firefighters only in the event of an incident, they train and drill with the Kurtz firefighters, including attending specialized training in Corpus Christi, Texas. In addition, all of the training described in the record that is provided to Kurtz firefighters relates to fire safety, prevention, and suppression. There is no evidence in the record suggesting that the 50 volunteer firefighters employed by Flint Hills who perform other jobs are trained in or involved in security functions, either.

To the extent that Kurtz firefighters are responsible to report intruders or suspicious vehicles they might see on their fire rounds, Blochinger testified that all 1700 of its and its contractors’ employees have the same responsibility. Moreover, this reporting function is incidental to their fire-related responsibilities of checking hoses, alarm testing, checking and recharging fire extinguishers, winterizing fire hydrants, fire

pump checks, fire alarm checks, and checks of post indicator valves, the fire water system and the fire water block. There is no evidence that Kurtz employees are trained to respond to any security issues unrelated to fire and fire safety issues; they do not carry weapons of any kind, and their uniforms differ from the premises' traditional security guards.

The Employers cite McDonnell Aircraft Co. v. NLRB, 827 F.2d 324 (8th Cir. 1987), to support its position that the Kurtz firefighters are guards. While the Board respectfully disagrees with the McDonnell decision, for the reasons described in Boeing Co., supra, I also find factors that distinguish this matter from McDonnell.

First, there is little evidence in this record that Kurtz firefighters are specifically obligated to enforce rules by reporting violations to responsible supervision. The main exception is during maintenance turnarounds, when Kurtz firefighters are assigned to audit employees and contractors for compliance with fire safety rules and turn in reports of their observations to Flint Hills' safety department. However, Flint Hills' witnesses repeatedly insisted that the Kurtz firefighters had no more responsibility to report unsafe acts or rule violations than any other employee or contractor's employee on the premises, even during turnarounds. In addition, there is no evidence that Kurtz firefighters' reports result in corrective action. Second, there is no evidence in this record that Kurtz firefighters have any different or additional responsibilities, specifically any broader role in security issues, in the event of a strike.

Supervisory Issues

The burden of proving supervisory status rests on the party asserting it, and any deficiencies in the record must be construed against that moving party. Supervisory

status will be found only when an individual uses independent judgment and discretion to exercise one or more of the supervisory indicia specifically set forth in Sec. 2(11) of the Act. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 710-711 (2001); Arlington Masonry Supply, Inc., 339 NLRB 817, 818 (2003).

Conclusionary statements to the effect that a person has or exercises one of the statutory criteria are insufficient to prove supervisory status without some explanation or detailed support. Also, in enacting Section 2(11) of the Act, Congress sought to distinguish between persons who are truly vested with management prerogatives and “straw bosses, leadmen, and set-up men” (NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974)), who have authority to issue some directions or “minor orders.” E.g., Armstrong Machine Co., 343 NLRB No. 122 (Dec. 16, 2004); Rhee Bros., Inc., 343 NLRB No. 80 (Nov. 23, 2004).

I find Bloomstrand is a supervisor based on authority to hire. He independently screens applications to eliminate those who do not meet minimum qualifications, chooses the finalists when an opening occurs, and communicates hiring decisions to the applicants. In the only one of five recent hiring decisions in which anyone higher up provided any input into the decision, Bloomstrand acted contrary to Hermes’ qualified suggestion. The fact that he solicits opinions from Captains and firefighters does not diminish his ultimate authority, particularly as it appears that he decided to seek input from the Captains and firefighters. Thus, from this record it appears that Bloomstrand determines what method to use in selecting applicants for hire.

On the other hand, I find insufficient evidence that Captains have authority to hire. They participate in interviews, and Bloomstrand testified that he and the Captains

together came up with a system for scoring and ranking applications, which determines the order in which applicants are considered when there is an opening.

First, I do not consider the ranking step an effective recommendation. Ranking or narrowing the field is “too attenuated” from the actual hiring decision to be an effective recommendation to hire. Boston Medical Center Corp., 330 NLRB 150, 201 (1999). See also Wake Electric, 338 NLRB 298, 298-299 (2002) (screening out seven applications and forwarding three to the department head, who makes final selection, not an effective recommendation because it “simply ranks applicants according to their qualifications”).

Second, I do not consider the final interview and consensus decision, in which all the firefighters on a crew sometimes participate, an effective recommendation either. The consensus process as described in this record does not support finding that any individual involved exercised independent discretion or exerted any particular influence. Compare Tusculum College, 199 NLRB 28, 30 (1972) (committee members not supervisors where “no reason to believe any one member of the committee can effectively recommend action”) with Holly Farms, 311 NLRB 273, 297 (1993) (committee member with vote equal to other members found supervisor based on potential to break a tie with his vote).

The evaluations conducted by either Bloomstrand or the Captains are not sufficient to support finding supervisory status. “Evaluation” is not a 2(11) criteria. I do not consider the evaluations effective recommendations on any of the explicit 2(11) factors. The evaluation forms include no explicit recommendations. There is no

evidence Bloomstrand or the Captains are ever told what if any effect the evaluations will have on wage increases or other terms or conditions of employment.

Vana insisted that he considered only Bloomstrand's and the Captains' evaluations in deciding how much of a raise to give each employee. However, in looking closely at the record, even though all four of the employees whose evaluations were offered as evidence "exceeded expectations" according to the Captains who evaluated them, Vana and Hermes somehow decided that one of those employees was merely average and one was below that. Although Vana was asked how he converted the evaluations' 1 to 3 scores into his 5 to 1 scores, I find his answer unresponsive. In addition, Hermes testified that "we did our own evaluations," which further suggests that they did not rely solely on Bloomstrand's or the Captains' evaluations.

The Employers carry the burden of proving that the evaluations done by Bloomstrand and the Captains are effective recommendations. Any deficiencies in the record must be construed against them. Only Vana's final ranking is directly linked to the employees' final pay increase. There aren't enough evaluations in the record to establish any correlation between Bloomstrand's and the Captains' evaluations and the amount of raises, and the evaluations that are in evidence anecdotally suggest the contrary. Accordingly, I conclude that neither Bloomstrand nor the Captains grant wage increases or effectively recommend them. See Wal-Mart Stores, Inc., 340 NLRB No. 31, slip op. at 5-6 (Sep. 17, 2003).

Similarly, I find that neither Bloomstrand nor the Captains effectively recommend layoffs. In the single reduction-in-force incident described, Bloomstrand and the

Captains ranked the firefighters and Vana laid off the low scorer, but there is no evidence that Bloomstrand or the Captains even knew the purpose of the ranking.

I also find insufficient evidence that Bloomstrand or the Captains assign or direct other employees based on independent judgment. Although Bloomstrand may be “responsible” for the schedule, I find no room for independent judgment. Flint Hills establishes the number of firefighters that must be on duty. In case of any vacancies for vacations, illnesses, or other reasons, Kurtz has always relied on volunteers. In case of a vacation request or something he can plan for, Bloomstrand merely posts the schedule and waits for someone to sign up. In case of more precipitate absences, Bloomstrand, a Captain, or any other employee might call around to find a volunteer.

Since virtually any extra shift to cover an employee absent from the regular schedule will be at overtime rates, it does not matter to Kurtz who is chosen. Hermes testified that in a crisis Bloomstrand would force the employee with the least overtime on the books to work. There is no evidence that has ever happened, however; and, in addition, Hermes belied any room for Bloomstrand to exercise discretion.

I find no evidence that Bloomstrand or the Captains assign shifts or transfer employees from one shift to another. Employees are hired to fill an opening on a particular shift. There is no evidence anyone has ever been moved from one shift or crew to another. Employees bid on the day or night shift when they have to work 12-hour shifts for a maintenance turnaround, but those bids are determined by seniority according to Kurtz’s bid sheets—not supervisory discretion.

It appears, therefore, that no Kurtz employee on the refinery premises has independent authority to assign and direct the work of the other employees. However,

the daily routine is basically established by Flint Hills' MI checklist. These are skilled employees who regularly participate in rigorous training to prepare for virtually automatic responses to emergency situations. It does not belittle the importance of the work to call it "routine" in this context—it simply does not require independent judgment to decide whether to inspect the hoses first and the fire extinguishers second, or vice versa. I will not shoehorn supervisory status onto someone on site when it appears that the employees don't need such close supervision.

Finally, I find insufficient evidence that either Bloomstrand or the Captains have authority to discipline or discharge other employees. The handbook job description's conferral on the Contract Coordinator of responsibility for "[m]anagement of disciplinary procedures . . . as directed by chief officers" does not prove independence. Moreover, there is evidence that Bloomstrand believed he would have disciplinary authority when he applied for the job. However, the examples in the record belie this evidence.

There is no evidence that any Captain participated at all in the decisions other than signing the warning form in the blank by the word "Captain." The single warning offered in the record was directed by Hermes; the single discharge was decided by Hermes, according to her, despite Bloomstrand's contrary recommendation in favor of giving the employee another chance. Bloomstrand's e-mail recommending discharge is not persuasive evidence of an effective recommendation in light of Hermes' contradictory testimony.

I find secondary indicia to support distinguishing between Bloomstrand and the Captains. Bloomstrand got a \$5000-a-year raise when he was promoted from Lieutenant (at a time when Kurtz used that rank instead of Captain for apparently the

same position) to Contract Coordinator, while Captains receive only a \$500 raise upon promotion from the ranks of firefighters. Last year there was \$1000 difference between the highest and lowest merit raise available, which could have vaulted a firefighter ahead of a Captain. I find the \$5000 raise for the Contract Coordinator sufficient to suggest responsibility, while the \$500 raise for a Captain does not.

6. The following employees of Kurtz Paramedic Services, Inc. constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time firefighters and captains employed by Kurtz Paramedic Services, Inc. at the Flint Hills Resources Rosemount, Minnesota petroleum refinery; excluding office clerical employees, and guards and supervisors as defined by the Act.

DIRECTION OF ELECTION³

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, and who meet the eligibility formula set forth above. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before

³ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **February 3, 2006**.

the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁴

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **United Steelworkers International Union, Local 662.**

Signed at Minneapolis, Minnesota, this 20th day of January, 2006.

/s/ Robert W. Chester

Robert W. Chester, Acting Regional Director
Region Eighteen
National Labor Relations Board

⁴ To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Acting Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Acting Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, 330 South Second Avenue, Suite 790, Minneapolis, MN 55401-2221, on or before close of business **January 27, 2006**. No extension of time to file this list may be granted by the Acting Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.